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No. 93-1261

In The

Supreme Court of the United States

October Term, 1993

MYONG MAGNUSON,

Petitioner,

vs.

CITY OF MINNEAPOLIS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Public Nuisance Law, Minn. Stat. §§ 617.80 through 617.87 (1992), which authorizes closure of a building or portion thereof for one year upon a determination that a certain number of prostitution convictions had occurred there, violate the Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution?

2. Does the Public Nuisance Law violate the Petitioner's right to freedom of association under the First Amendment to the United States Constitution?

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BRIEF IN OPPOSITION

The Respondents City of Minneapolis and State of Minnesota respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter "Pet.") seeking review of the decision of the Minnesota Court of Appeals in this case. The opinion of the Minnesota Court of Appeals is reported as *Minneapolis v. Fisher,* 504 N.W.2d 523 (Minn. Ct. App. 1993), and is reproduced in the appendix to the petition (hereinafter "Pet. App.") at pages A180-A200. The Minnesota Supreme Court's order denying review is reproduced in the appendix to the petition at pages A201-02.

STATEMENT OF THE CASE

The Petitioner Myong Magnuson challenges the constitutionality of the Public Nuisance Law, Minn. Stat. §§ 617.80 through 617.87 (1992), which essentially creates a statutory cause of action for abatement of particular activities that the legislature has defined as public nuisances. Minn. Stat. § 617.81, subd. 2(a) (1992), provides, in relevant part:

> [A] public nuisance exists upon proof of three or more misdemeanor convictions or two or more convictions, of which at least one is a gross misdemeanor or felony, within the previous two years for:
>
> (1) acts of prostitution or prostitution-related offenses committed within the building.

Subdivision 3 of section 617.81 requires that notice of a conviction described in subdivision 2 be mailed by the court administrator to the owner of the building where the offense was committed and all other interested parties. It further requires that the notice be filed with the county recorder.

Minn. Stat. § 617.82 (1992) permits a city attorney, county attorney, or the Attorney General to seek a temporary injunction in state district court to enjoin conduct creating a public nuisance as defined in the statute. Section 617.83 requires a court, upon the proof of a nuisance as defined in the statute, to issue a permanent injunction and an abatement order. The injunction must describe the conduct to be enjoined. The abatement order must direct the closing of the building, or part of it, for one year. *Id.* The abatement order must be served upon the owner of

the building and must be posted in a conspicuous place on the building or on the affected portion thereof. *Id.*

There are two ways that an abatement order can be avoided. First, pursuant to section 617.85, if the conduct resulting in the abatement order involved the acts of a tenant or lessee, the owner of the property can terminate the lease and avoid, or have vacated, the abatement order. Alternatively, pursuant to section 617.87, the court can release the subject property if the owner posts a bond, not to exceed $50,000, conditioned on the abatement of the nuisance for a period of one year. The owner is then subject to forfeiture under the bond of $1,000 for each day that he or she knowingly permits conduct that resulted in the abatement order to occur during the one year release period.

Petitioner's challenge to the Public Nuisance Law arises in the context of an appeal from a February 24, 1992, district court order abating a public nuisance at Yoshiko's Sauna, located in a building at 117 Washington Avenue North, Minneapolis. Pet. App. A168-76. The building is owned by Helen Fisher and Un Sil Olson (also known as Un Sil Berg) as tenants in common. Pet. App. A169. In addition to housing Yoshiko's Sauna, the building contains residential apartments. Pet. App. A115.

Originally, Fisher and Olson operated Yoshiko's Sauna, each owning 50 percent of the business. Pet. App. A115. Fisher leased and later sold her interest in the business to appellant Myong Magnuson. *Id.* Fisher also leased the portion of the building where Yoshiko's Sauna was located to Magnuson. *Id.* Olson then leased her 50 percent interest in the premises and the business to Suzy

Woo Kotts. *Id.* Magnuson operated Yoshiko's on Wednesdays, Thursdays, Saturdays, and alternating Sundays pursuant to her lease with Helen Fisher. *Id.* at A119-20. Suzy Woo Kotts operated Yoshiko's on Mondays, Tuesdays, Fridays, and alternating Sundays. *Id.* at A120.

Based on two prostitution convictions for conduct which occurred at Yoshiko's Sauna, Respondent City of Minneapolis ("City") brought an action in Hennepin County District Court against Fisher, Olson, Magnuson, and Kotts seeking a temporary and permanent injunction and an order of abatement pursuant to the Public Nuisance Law. Pet. App. A3-11. At the temporary injunction stage, Magnuson argued that closure of the business would punish her for the sins of Kotts, since the two prostitution convictions were based on conduct that occurred on Tuesday, when Kotts operated Yoshiko's. The district court rejected the argument, stating:

> This argument exalts form over substance. Kotts and Magnuson are running one business, Yoshiko's, in one physical plant, using the same equipment, telephone, furniture, heat, electricity, and, in some instances, staff. They cannot be construed as separate.

Id. A124. An order enjoining the operation of Yoshiko's Sauna until further notice of the court was issued September 8, 1992. *Id.* A118-23.

After issuance of the temporary injunction, a new business opened at 117 North Washington, Minneapolis, called "M's Health Club," which appeared to be the same business as Yoshiko's Sauna under another name. *Id.* A165-66. On October 28, 1992, the district court refused to

modify the temporary injunction to cover "M's Health Club" and granted a motion of Olson to evict Kotts and restore Olson's interest in the premises at 117 Washington Avenue North. *Id.* A164-67.

By February 24, 1992, two additional prostitution convictions had been obtained for conduct that occurred at 117 Washington Avenue North. *Id.* A171-72. The district court issued an order finding that a public nuisance existed in the building located at 117 Washington Avenue North. *Id.* A168-76. The district court found that notices of the four prostitution convictions had been mailed by the district court to the owners of the property and to interested parties and had been filed with the county recorder. *Id.* A172; see also A54-71. Magnuson does not contest the fact that she received these notices. The court permanently enjoined the defendants from operating, allowing the operation of, or leasing to others who operate Yoshiko's Sauna, or any other sauna, massage parlor, rap parlor, escort service, modeling service, outcall service, or similar business offering sexually oriented services. Pet. App. A174-76. The court also ordered that the portion of the building that contained Yoshiko's Sauna be closed for one year. *Id.* A175.

Magnuson, Fisher, and Olson appealed to the Minnesota Court of Appeals, challenging both the sufficiency of the evidence supporting the district court's decision and the constitutionality of the Public Nuisance Law. Pet. App. A177-79. The Attorney General intervened as respondent for the sole purpose of defending the constitutionality of the Public Nuisance Law. The Minnesota Court of Appeals affirmed the district court's decision. Pet. App. A180-A200. The court specifically upheld the

district court's factual determination that Yoshiko's Sauna was a single business entity and that the alternating-days arrangement of Magnuson and Kotts was simply for convenience. Pet. App. A190.

Magnuson thereafter sought review of the court of appeals' decision. By order dated September 30, 1993, the Minnesota Supreme Court denied the petition for review. Pet. App. A201-02.

REASONS FOR DENYING THE PETITION

A petition for certiorari is granted by this Court "only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Review may be granted when a state court has decided a federal question in a way that conflicts with decisions of this Court or of a United States court of appeals or when a state court has decided an "important question of federal law which has not been, but should be, settled by this Court." *Id.* This case, however, does not meet these standards and, therefore, the petition should be denied.

I. THE MINNESOTA COURT OF APPEALS' DECISION UPHOLDING THE PUBLIC NUISANCE LAW IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS UPHOLDING THE SAME LAW.

Magnuson argues that the Minnesota Court of Appeals' decision conflicts with the decisions of this Court and thus meets this Court's criteria for selecting

cases to be reviewed. However, the Minnesota Court of Appeals' decision is completely consistent with the Eighth Circuit Court of Appeals' decision in *Hvamstad v. Suhler*, 915 F.2d 1218 (1990), *aff'g* 727 F. Supp. 511 (D. Minn. 1989). The Eighth Circuit upheld the Public Nuisance Law against the very same challenges that Magnuson raised in the courts below. The Eighth Circuit, in turn, made its decision in accordance with the applicable decisions of this Court, and thus there is no reason to review the Minnesota Court of Appeals' decision.

A. The Public Nuisance Law Does Not Violate Magnuson's Right To Due Process.

Magnuson argues that the Public Nuisance Law deprives her of property without due process in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. According to Magnuson, procedural due process[1] is violated because, under the Public Nuisance Law, a building can be declared a public nuisance and closed based on two or three convictions for prostitution under circumstances where Magnuson had no opportunity to contest the validity of the underlying prostitution charges.

In *Hvamstad v. Suhler*, 727 F. Supp. 511 (D. Minn. 1989), *aff'd*, 915 F.2d 1218 (8th Cir. 1990), the federal courts have already considered and rejected precisely the

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[1] In the courts below, Magnuson alleged violations of both procedural and substantive due process. In the present petition, Magnuson does not appear to be seeking review of the Minnesota Court of Appeals' rejection of the substantive due process claim, and thus it is not addressed here.

same procedural process due claims concerning the Public Nuisance Law that have been advanced in this case. The federal district court noted that the law includes ample requirements for notice and opportunity to be heard before abatement can be ordered. The court rejected the claim that the landowner must be given the opportunity to contest the validity of the underlying prostitution convictions, stating:

> The legislature, in outlining the number of crimes necessary to automatically invoke the statute, was simply making a judgment under its police power as to what constitutes a nuisance. Such a legislative determination is subject to challenge only if no reasonably conceivable set of facts could establish a rational relationship between the statute and a legitimate end of government.

727 F. Supp. at 519 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). The court correctly concluded: "The legislature could properly conclude that convictions of prostitution or gambling on property are sufficient evidence that the property has become a nuisance." *Id.* The Eighth Circuit fully concurred in the district court's analysis. 915 F.2d at 1219-20. The Minnesota Court of Appeals' analysis followed that of *Hvamstad* and came to the same conclusion, rejecting Magnuson's procedural due process claim.

The Eighth Circuit and the Minnesota Court of Appeals were clearly correct in determining that the Public Nuisance Law contains ample requirements for notice and opportunity to be heard before abatement can be required. First, it requires notice to the owner of the

property of the convictions. Minn. Stat. § 617.82, subd. 3 (1992). This gives the owner a chance to stop the illegal conduct before the abatement provisions come into play.

When an abatement action is begun, the owner gets notice and an opportunity to be heard. Minn. Stat. §§ 617.82-.83 (1992). While the statute does not provide an opportunity to challenge the validity of the convictions, the owner can challenge whether the offenses occurred on her property and within the statutory time frame. Challenging this aspect of the abatement action would give an owner the chance to contest that any particular element of the criminal offense, such as the offer to exchange sex for money, occurred on her property. Additionally, the owner can avoid a closure order by terminating the lease of a tenant responsible for the convictions or posting a bond, which in the case of an innocent owner may be set at a nominal sum. Minn. Stat. §§ 617.85 and 617.87 (1992).

As the discussion above amply demonstrates, there is no conflict between the Minnesota Court of Appeals' decision and those of this Court or the Eighth Circuit.

Magnuson asserts that the lower court's decision conflicts with this Court's recent decision in *United States v. Good Real Property*, ___ U.S. ___, 114 S. Ct. 492 (1993). However, it is clear that the procedures of the Public Nuisance Law provide exactly the kind of due process that was *not* provided in *Good*, notice and an opportunity to be heard prior to issuance of the government's order concerning the property.

In *Good*, the government, in an *ex parte* proceeding, obtained a warrant of arrest *in rem*, based on a government affidavit that Good had been convicted several years earlier of promoting a harmful drug. The government then seized Good's home without prior notice to Good or an adversary proceeding. By contrast, in this case Magnuson received notices of the prostitution convictions, which later formed the basis for the closure order, and also notice and a hearing prior to issuance of the district court's order closing Yoshiko's Sauna. Thus there is no basis for a holding that the Minnesota Court of Appeals' decision conflicts with this Court's decision in *Good*.

Magnuson also contends that the lower court's decision conflicts with other decisions of this Court and the United States courts of appeals in which findings in an earlier lawsuit were not permitted to be binding in a second action against someone who was neither a party in the first action nor in privity with a party. These cases about the application of *res judicata* and collateral estoppel are superficially persuasive, but, on closer examination they miss the mark.

There is a crucial distinction between the nuisance abatement action authorized by the Public Nuisance Law and the cases relied on by Magnuson. In the collateral estoppel cases, a *litigant* tried to impose the result from an earlier case on a litigant in a second case. Here, the *legislature* has made a public policy judgment that as a matter of substantive law the occurrence of three misdemeanor convictions for prostitution at a particular location renders that property a public nuisance.

The legislature, acting within its police power to protect the health, safety and welfare of its citizens, can determine the circumstances in which a building will be considered a public nuisance.

> [I]t is . . . clear that acts or conditions which are detrimental to the comfort and health of the community may be effectively declared a nuisance by the Legislature, and in the exercise of that power specified acts or conditions may be declared a nuisance.

State v. Chicago, M. & St. P. Ry. Co., 114 Minn. 122, 125-26, 130 N.W. 545, 546 (1911). The Minnesota Legislature did just that in Minn. Stat. §§ 617.80-.87. The legislature enacted the Public Nuisance law as part of its efforts under the police power to control the criminal activity of prostitution and gambling by striking at centers of such criminal behavior. Thus, it has declared that property on which specified numbers of criminal offenses occur is a public nuisance.

Magnuson argues that she must be given an opportunity to prove that no prostitution occurred. That, however, is not the standard selected by the legislature. Instead, the legislature decided that three convictions for prostitution committed on the property within the designated time span indicate that it is a public nuisance, or put another way, that the property has become a center for the criminal conduct that the state wants to eliminate. Magnuson has cited no case in which such a legislative determination has been struck down as violative of procedural due process.

The only case Magnuson cites that involves any kind of legislative determination is *McKinney v. Alabama*, 424

U.S. 669 (1976). There, the Court struck down an Alabama law that imposed criminal sanctions for selling material that had been declared obscene in a prior civil proceeding. A criminal defendant could be convicted even if he or she had not been a party to the civil proceeding. *McKinney* does not control here for several reasons. There, the state law was subject to stricter due process scrutiny both because it imposed criminal sanctions and because it infringed on fundamental First Amendment rights, since the factual determination made binding on the defendant was the issue of obscenity. Neither of those factors are present here. Moreover, the statute in *McKinney* did not impose a substantive legislative determination on the defendant. Rather, it applied the subjective determination of obscenity made in one court proceeding on a criminal defendant in an entirely separate court proceeding. Here, in contrast, it is the legislature's own substantive judgment that three prostitution or gambling convictions constitute adequate evidence of nuisance that justifies closing the property.[2]

Magnuson attempts to bolster her argument by characterizing the convictions that may form the basis for the

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[2] Another distinction exists between an action to close property under the Public Nuisance Law and the cases relied on by Magnuson that sought to impose criminal or civil liability on an individual. The Minnesota courts have acknowledged, in ruling that a defendant in a nuisance abatement action is not entitled to a jury trial, that the nature of the action is really an action against the property, rather than an action to penalize the owner. *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N.W. 953 (1914). Thus, an abatement action under the Public Nuisance Law is basically an *in rem* proceeding.

finding of a public nuisance as factually meaningless, suggesting this would be the case in the event of convictions based on *Alford* pleas. Pet. at 20. Under *North Carolina v. Alford*, 400 U.S. 25 (1970), and *State v. Goulette*, 258 N.W.2d 758 (Minn. 1977), a defendant may constitutionally plead guilty while still denying that he or she committed the crime. Magnuson argues that the Public Nuisance Law could result in closure of property based on convictions for prostitution despite the criminal defendant's denial that the offense was committed. This argument is unavailing for several reasons.

First, it is entirely speculative. Magnuson does not even allege that any of the four convictions for prostitution at Yoshiko's Sauna were based on *Alford/Goulette* pleas. Thus, Magnuson has no standing to attack the law on this basis.

Second, it is misleading. In order to make a valid *Alford* plea, not only does a defendant have to make a knowing and intelligent waiver of her or his right to go to trial, but a judge cannot accept the plea without evidence showing a "strong factual basis" for the defendant's guilt. *See Alford*, 400 U.S. at 37-38. Under *Goulette*, the court must assure itself, through interrogation of the defendant and review of the factual basis offered, that there is sufficient evidence to support a conviction for the offense. *Goulette*, 258 Minn. at 761-62. So even in an *Alford/Goulette* plea situation, the conviction will be based, at a minimum, on a "strong factual basis" that would be sufficient for a conviction.

Third, it is irrelevant. The argument again ignores the fact that what is at issue is a legislative judgment of what

constitutes a public nuisance, not an issue of *res judicata* or collateral estoppel.

Because the Minnesota Court of Appeals' decision is in concert with the decision of the Eighth Circuit Court of Appeals and with decisions of this Court, the Petition should be denied.

B. The Public Nuisance Law Does Not Violate Any Associational Rights.

1. The State Law Regulates Criminal Conduct On Magnuson's Property, Not Magnuson's Associations.

Magnuson argues that the Minnesota Court of Appeals' decision conflicts with decisions of this Court relating to the right of freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution. She argues that the Public Nuisance Law violates her First Amendment right to freedom of association because its enforcement can result in the closure of her business for a year through no wrongful act of her own, but based solely on the conduct of others. Magnuson asserts that this constitutes a punishment not for her own conduct but rather solely for association with others who engage in wrongful conduct. Although Magnuson does not specifically identify which of her relationships are protected by the First Amendment, one must assume it is her relationship with the women who were convicted of prostitution, since it was the wrongful conduct of these women that caused initiation of the abatement proceedings.

The Minnesota Court of Appeals' decision is entirely consistent with the decision of the Eighth Circuit in *Hvamstad v. Suhler*, 915 F.2d 1218 (8th Cir. 1990), *aff'g* 727 F. Supp. 511 (D. Minn. 1989). In *Hvamstad*, the federal courts considered and rejected precisely the same associational freedom claims concerning the Public Nuisance Law that have been asserted by Magnuson. The courts found that the Public Nuisance Law does not subject Magnuson's property to closure because of Magnuson's associations. Rather, an abatement action is authorized based on the repeated occurrence of criminal conduct on the property or, as the federal district court analyzed it, 727 F. Supp. at 518, the failure to stop the recurrence of criminal activity. As the district court stated in *Hvamstad*, *id.* at 519, with respect to the plaintiff in that case:

> The statute would penalize her not for the wrongs of her associates, but for her failure to rid her property of the nuisance.

The Eighth Circuit fully concurred in the district court's analysis. *Hvamstad*, 915 F.2d at 1219.

The Eighth Circuit and the Minnesota Court of Appeals were correct in rejecting the associational freedom challenge to the Public Nuisance Law. The law does not directly regulate Magnuson's right to association. It does not attempt in any way to tell Magnuson with whom she may or may not associate. Nor does it impose any consequences on her solely because of her association with particular individuals or groups. Accordingly, whatever effect the statute may have on Magnuson's associational rights is indirect and incidental.

The Minnesota Court of Appeals' decision is also consistent with the decisions of this Court. The Court confronted a similar issue in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, the Court considered a county's attempt to close a New York "adult" bookstore under a state statute allowing the government to close property used as a place for prostitution. The owners of the store contested the closure, arguing that it would violate their First Amendment rights, specifically, the right to sell books that had not been declared obscene. This Court held that the closure did not impinge on the owners' First Amendment rights. *Id.* at 706-07.

The Court reasoned that the statute directly threatened only prostitution, which had "no element" of protected expression. *Id.* at 705. The property was subject to the closure order because illegal prostitution had occurred there, not because of the sale of books. The fact that the sale of books would incidentally be affected by the closure order did not render the statute invalid. The Court explained that a party could not use a form of protected expression, selling books, as a "cloak" for unprotected activity. *Id.* The Court noted further that the burden was mitigated because the owners could sell books at another location. *Id.* at 705.

Magnuson's argument is slightly different from that made in *Arcara*. In *Arcara*, the First Amendment harm alleged was that the closure would interfere with protected bookselling in the future. Here, Magnuson argues not that the closure of a portion of the building at 117 Washington Avenue North would interfere with the future exercise of her right to association, but that she is subject to adverse action by the state because of her past

association with others. Nevertheless, the principles and the test applied in *Arcara* apply here as well.

In *Arcara*, the Court pointed out that the owners' property was subject to closure because of the prostitution that occurred there, not because of the sale of books. Similarly, here, the portion of Fisher and Olson's building housing Yoshiko's Sauna is subject to closure because prostitution occurred there, not because of Magnuson's association with the prostitutes. Magnuson can associate with convicted prostitutes all she wants; the Public Nuisance Law will nonetheless have no effect on Magnuson's property unless there are convictions for prostitution that took place on Magnuson's property. Plainly it is not Magnuson's association with prostitutes that brings the statute into play, but rather, as in *Arcara*, the repeated criminal conduct on Magnuson's property.

In *Arcara*, the Court concluded that civil, and even criminal, sanctions that may have some indirect effect on First Amendment rights are subject to rigorous First Amendment scrutiny "only [1] where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or [2] where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity." *Id.* at 706-07.

Applying these tests to the Public Nuisance Law reveals no First Amendment violation. As in *Arcara*, here the activity that could draw the legal remedy is prostitution, not protected expression. Second, the Minnesota Public Nuisance Law does not have the "inevitable effect of singling out those engaged in expressive activity." The

law applies to *any* building in which persons have engaged in prostitution. Thus, the statute does not single out any protected activity.

Just as the owner in *Arcara* was not allowed to use its bookselling activity as a cloak to avoid the consequences of allowing illegal prostitution to take place on its property, Magnuson should not be allowed to use her claim of "association" as a cloak to avoid similar consequences for similar conduct. Thus, Magnuson's property was subject to closure not because of her associations, but because of her failure to stop recurrent prostitution on her property. *See Trade Waste Management Ass'n. Inc. v. Hughey*, 780 F.2d 221, 237 (3d Cir. 1985).

Magnuson cites a number of cases in support of her association argument. These cases, such as *Elfbrandt v. Russell*, 384 U.S. 11 (1966), involved statutes that directly punished people for belonging to particular organizations. For example, in *Elfbrandt*, the statute imposed penalties for belonging to the Communist Party or its affiliates. Similarly, in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), the statute at issue prevented civil service appointments for members of the Communist Party. Thus, the challenged laws purported to directly regulate association *per se*. No matter where, when or how the associations took place, they would result in the adverse consequences of the law. Similarly, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), involved punishment of association *per se*. The issue was whether the defendants could be subjected to liability solely because of their association with other participants in the boycott.

Here, in contrast, the Public Nuisance Law is not directed at Magnuson's associations. As explained above, she is free to associate with prostitutes with no adverse consequences. It is only when prostitution is repeatedly committed on property over which Magnuson has an ownership or possessory interest that the Public Nuisance Law will adversely affect her. Accordingly, Magnuson's reliance on cases in which association itself was penalized is misplaced.

Thus, it is apparent that unlike the cases relied on by Magnuson, the statute here does not impose consequences as a result of Magnuson's associations, but rather as a result of repeated criminal conduct at Yoshiko's Sauna.

2. Magnuson's Employment Relationships Are Not Protected Associations.

An additional flaw in Magnuson's association argument is that the associational interest that she claims is infringed is not protected by the Constitution. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court extensively examined the right to association. The Court observed that its decisions had referred to "freedom of association" in two "distinct senses." In the first sense, the Constitution has protected individuals in their "choices to enter into and maintain certain intimate human relationships." This kind of freedom of association is a fundamental aspect of personal liberty. *Id.* at 617-18.

On the other hand, the right to associate also protects those who join together to exercise their core First

Amendment rights, such as speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.* The Constitution protects this aspect of the freedom to associate because many of the fundamental rights guaranteed by the First Amendment cannot be exercised effectively unless individuals are allowed to band together for that purpose. Analysis of each of these two recognized aspects of the right to associate demonstrates that Magnuson's challenge to the Public Nuisance Law is meritless.

a. Magnuson's association claim does not involve protected intimate relationships.

Magnuson's associations affected by the Minnesota law are not in the first category discussed by the Court, intimate relationships. The relationships for which Magnuson claims she is being punished are presumably her relationships with the four women who were convicted of prostitution at Yoshiko's Sauna. These are precisely the types of relationships involved in *Hvamstad*, which "fall far from the familial relationship end of the intimate relationship continuun." *Hvamstad*, 727 F. Supp. at 520.

Magnuson's relationships were not of the variety that the Court has recognized as entitled to protection based on intimacy. They do not deal with the "creation and sustenance of a family marriage," *see Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); childbirth, *Carey v. Population Services International*, 431 U.S. 678, 684-86 (1977); raising and educating children, *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); or living together with one's relatives. *Moore v. East Cleveland*, 431 U.S. 494

(1977). Presumably they are simply employment relationships. They were not intimate in any sense recognized by this Court.

Moreover, Magnuson does not dispute the fact that Yoshiko's Sauna is a business enterprise. This Court has recognized the distinction between business relationships and intimate ones. As the Court said in *Roberts*, "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Id.* at 620 (comparing *Loving v. Virginia*, 388 U.S. 1 (1967), with *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)). Accordingly, courts have declined to accord business relationships the constitutional protection provided to intimate relationships. *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1193 (9th Cir. 1988); *Trade Waste Management Ass'n. Inc. v. Hughey*, 780 F.2d 221, 237 (3d Cir. 1985).

Magnuson's association with the four convicted prostitutes plainly is not entitled to the constitutional protection afforded intimate relationships.

b. Magnuson's claim does not involve expressive association protected by the First Amendment.

The Public Nuisance Law also does not implicate the second aspect of the freedom of association: the right to associate to engage in activities protected by the First Amendment, or expressive association. This aspect of the right to associate is designed to protect those who join together "in a collective effort on behalf of shared goals."

This right is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

Indeed, the cases relied on by Magnuson involve this category of association. *E.g., NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982) (purpose of boycott was to express "dissatisfaction with a social structure that had denied them rights to equal treatment and respect"); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (Communist Party affiliation); *Keyishian v. Board of Regents of the Univ. of the State of New York*, 385 U.S. 589 (1967) (Communist Party affiliation); *Healy v. James*, 408 U.S. 169 (1972) (association with Students for a Democratic Society). In contrast, Magnuson does not claim that she joined together with the women who engaged in prostitution at Yoshiko's Sauna to express any views or ideology. There simply is no "collective effort on behalf of shared goals" in this case. *See Roberts*, 468 U.S. at 622. Rather, we have here only employment relationships, the purpose of which was profit for both Magnuson and her employees. Significantly, none of the cases cited by Magnuson identify as worthy of constitutional protection the kind of associations upon which she relies.

Magnuson attempts to circumvent these deficiencies in her argument by positing a distinction between cases where the law regulates associations, such as *Roberts*, and those that criminalize or punish the association itself, such as *Scales v. United States*, 367 U.S. 203 (1961) (Communist Party membership made criminal). She argues that a statute which punishes association violates the

First Amendment even if the association is neither intimate nor expressive. Pet. at 29 n.15.

This argument is based on misreading and misapplication of the cases. First, many of the cases pre-date *Roberts*, and the courts therefore did not have the benefit of this Court's intimate/expressive association analysis. See *Scales v. United States*, 367 U.S. 203 (1961); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Tyson v. New York City Housing Authority*, 369 F. Supp. 513 (S.D.N.Y. 1974); *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980); *Fisher v. Snyder*, 346 F. Supp. 396 (D.Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973). Thus, to whatever extent these cases do imply that there were violations of the right to association without expressive or intimate characteristics, they are questionable precedent. Second, several of the cases relied on really turned on the due process requirement that *criminal* guilt must be based on personal conduct rather than that of another person. *E.G., Scales, Tyson, Sawyer.* Third, two of the cases arguably involved intimate relationships. *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984) (police officer fired for dating daughter of felon); *Fisher*, (unmarried teacher fired for having male houseguests). Therefore, the cases cited by Magnuson cannot be relied on for the principle she advocates. *See IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1192 (9th Cir. 1988) (distinguishing several of these cases on the same grounds).

In sum, there is no basis on which to conclude that the Minnesota Court of Appeals' decision conflicts with the decisions of this Court with respect to the freedom of association.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT UNSETTLED FEDERAL QUESTION.

Because the decision of the Minnesota Court of Appeals is consistent in every way with the Eighth Circuit's decision in *Hvamstad v. Suhler*, 915 F. Supp. 511 (D. Minn. 1989), and with the relevant precedents of this Court, there is no unsettled federal question which needs to be decided by this Court. Therefore, Magnuson's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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Respectfully submitted,

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